No. 01-918

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

VENETIAN CASINO RESORT, L.L.C.,

Petitioner,

—v.—

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, *et al.*,

Respondents,

—and—

AMERICAN CIVIL LIBERTIES UNION OF NEVADA, *et al.*,

Respondents-Intervenors.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS-INTERVENORS IN OPPOSITION

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QUESTION PRESENTED

Once a property owner has given up a permanent right-of-way for municipal sidewalk traffic, does it suffer a Fifth Amendment taking when pedestrians exercise free speech rights on the thoroughfare?

CORPORATE DISCLOSURE STATEMENT

The ACLU of Nevada is a separately incorporated not-for-profit entity affiliated with the American Civil Liberties Union. It has no stock and no parent corporation.

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STATEMENT OF THE CASE

This case involves a contractual dispute about the scope and effect of a recorded servitude contained in a real property contract requiring unobstructed pedestrian use along a privately owned and maintained sidewalk which replaced the public sidewalk that was demolished when the Venetian was built in 1999. The 1999 contract between petitioner, Venetian Casino Hotel and Resort, and the Nevada Department of Transportation (NDOT), was required by an earlier development agreement with the county for the construction of the property. App. 2a-3a. The Venetian is one of numerous hotel-casinos along Las Vegas Boulevard, also known as "The Las Vegas Strip." The sidewalk runs along Las Vegas Boulevard in front of the Venetian and is contiguous on both ends with public sidewalks running parallel to and abutting the street for the entire length of the Strip.

Tens of thousands of visitors and residents walk along these sidewalks daily as part of the "Las Vegas experience." Las Vegas Boulevard is the major traffic artery anchoring the major tourist district in Las Vegas. The sidewalk at issue is, by design, incorporated into the pedestrian traffic grid along the Strip and is the only means for pedestrians to walk down the street on the east side of the Boulevard. The unobstructed pedestrian use required by the agreement entered into between the Venetian and NDOT is enforceable by a separate provision of the contract requiring the Venetian to grant a right of way to the Department in the event pedestrian use is obstructed. The servitude and the other terms of the agreement run with the property and are binding on all successors. App. 2a-3a.

The circumstances which led to the construction of the Venetian and the dedication of the servitude are accurately set forth in the Statement of the Case prepared by respondent Local-Joint Executive Board of Las Vegas, Culinary Workers Local 226 and Bartenders Union Local

165, AFL-CIO (collectively, "the Union"), and the Ninth Circuit's Statement of the Case. App. 2a-4a. The ACLU of Nevada and Gary Peck (collectively "the ACLUN") incorporate both statements herein.

We write separately to emphasize that petitioner's dedication of the servitude is not only established by the 1999 contract entered into with NDOT, but also by a binding development agreement entered into in 1997 with Clark County requiring dedication of a right-of-way as part of the development agreement and approval process. The two agreements must be read together because approval of the development of the Venetian was dependent on compliance with the terms of both agreements. The Ninth Circuit's decision only looked to the 1999 NDOT agreement because Las Vegas Boulevard is on a state right-of-way. However, the right-of-way providing pedestrian passage along Las Vegas Boulevard is contractually required under the terms of both documents.

As part of the development process it was necessary for the Venetian first to enter into an agreement with Clark County officials. App. at 49a. That agreement required the construction of various improvements to the streets and sidewalks to facilitate vehicular and pedestrian traffic along the Venetian's frontages on Las Vegas Boulevard South, commonly referred to as the "Las Vegas Strip," and any improvements recommended by a traffic impact study. App. 49a. The 1997 agreement also contains the following provision where the developer agrees to turn over proposed public property rights:

> DEVELOPER agrees to convey all proposed public property rights owned by the DEVELOPER to the COUNTY or the State of Nevada Department of Transportation, at no cost or expense, free and clear of all liens, covenants, restrictions and encumbrances. as required for

> construction, maintenance or use of the IMPROVEMENTS . . . . Any conveyance of land by the DEVELOPER to the COUNTY or the State of Nevada, for public use of sidewalks, walkways or other forms of pedestrian passage through the DEVELOPMENT, will be for facilitating the perpetual flow of pedestrian traffic . . . without restrictions. App. 49a.

Following the acceptance of the Agreement, the Venetian completed the required traffic impact study, which concluded that traffic would be accommodated by widening Las Vegas Boulevard and adding another northbound lane. That solution, however, required destruction of the existing sidewalk leaving no means for pedestrians to walk down the street. Pet.App. 50a. Since the public land at issue belonged to the State of Nevada, rather than the County, the Venetian was required to negotiate with NDOT in order to affect the changes required by the 1997 Clark County Agreement.

Despite the plain language of the 1997 and 1999 contracts dedicating the sidewalks to the public use as a pedestrian thoroughfare, the Venetian argues that the provision in the NDOT agreement granting the hotel "full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment[s] to the United States Constitution" afford it the absolute discretion to prohibit any and all speech it disapproves of. Petitioner further argues that the failure of Defendants Clark County and the Las Vegas Metropolitan Police Department to arrest those who engage in such "disapproved" expression constitutes an uncompensated "taking" in violation of the Fifth and Fourteenth Amendments. Yet, neither this provision nor any other provision in the agreement confers upon the Venetian the right to exclude protestors or otherwise suppress speech. The fact that petitioner now apparently regrets the

terms of its own negotiated agreement does not entitle it to seek the assistance of local law enforcement in removing disfavored speakers from a public forum.

REASONS FOR DENYING THE WRIT

The petition for *certiorari* attempts to create a constitutional mountain out of a contractual molehill. We respectfully submit that the petition should be denied for the reasons set forth below, in addition to the reasons set forth by respondent Union in its opposition.

First, as both the majority and dissent below recognized, there is less disagreement about the legal principles in this case than about the precise meaning of particular contract provisions. However important that contract dispute may be to the parties involved, its fact-specific nature does not present an issue of general significance and does not warrant this Court's plenary review.

Second, even if petitioner's construction of the contracts were assumed to be correct, the Venetian would not be entitled to the relief sought in this case. The hotel-casino agreed to open up its property to unobstructed pedestrian use in order to resolve the issue of pedestrian passage required as part of the approval process in the 1997 development agreement with the County and the 1999 agreement with the NDOT. Both of these agreements were undertaken at the Venetian's initiative. By giving up the right to exclude the public from its property and agreeing to perform a municipal function, the basis for petitioner's claim that local authorities have unlawfully taken its property in violation of the Fifth and Fourteenth Amendments is completely undermined. Yet, these are the only claims raised by petitioner in this case. At the very least, this case does not clearly and directly present the Fifth Amendment takings and Fourteenth Amendment due process claims alleged by the Venetian.

Those issues are clouded by petitioner's voluntary decision to construct and maintain a public sidewalk that is private in name only.

Furthermore, even if this case is analyzed in the abstract, divorced from the actual agreements involved, petitioner overstates the importance of the issues at stake here. There is nothing remarkable or legally significant about the issues in this case or the Ninth Circuit's treatment of them. Petitioner has voluntarily taken on a traditional governmental role. Thus, the Venetian may be held constitutionally accountable for its actions. This Court's cases have long held that private property and private parties may be subject to constitutional requirements in circumstances where they are performing a public function. Applying those cases, the Ninth Circuit correctly held that petitioner was constrained by constitutional requirements because it voluntarily assumed the responsibility of local government when it agreed to replace the public sidewalk with its own sidewalk.

Finally, this case does not conflict with any decisions from other courts. No other Circuit has ruled differently from the Ninth Circuit. Moreover, petitioner mischaracterizes the holding of a Nevada Supreme Court case in an attempt to draw this Court into a non-existent conflict. The Ninth Circuit's decision is firmly in line with those of this Court and others.

I. THE CENTRAL DISPUTE IN THIS CASE INVOLVES THE CONSTRUCTION OF SPECIFIC CONTRACTUAL LANGUAGE RATHER THAN ANY OVERARCHING CONSTITUTIONAL CONFLICT

Despite the Venetian's assertions to the contrary, this case is less about a dispute concerning an overarching constitutional dispute between free speech and property rights

than it is about the construction of specific contract language. The majority below construed that contract language as a clear expression of the parties' intent to provide the public with all of the rights on the replacement sidewalk that it had enjoyed on the previous sidewalk, including the right to free speech associated with a public forum. Pet.App. 19a. The dissent by Judge Brunetti disagreed with the majority's construction of the relevant contract language, but not with its view that the outcome of this case turns on the fact-specific meaning of particular contract provisions read in their unique context.

> I agree with the majority that, if the Venetian had truly given the public an explicit right to its property in the 1999 Agreement, then this sidewalk would indeed fall within the ambit of the First Amendment. This is in essence a matter of contract interpretation, and I believe that close scrutiny of the circumstances that led to the contract and the plain language of the contract itself, as well as the history of the piece of property at issue and its physical characteristics, will compel an entirely different conclusion than that arrived at by the majority.

Pet.App. 27a-28a.

In construing the contract language, the majority below expressly rejected petitioner's claim that it had reserved the right to exclude anyone it chose from access to the replacement sidewalk. After carefully reviewing the contested provisions, the court below concluded that petitioner had in fact contractually agreed to guarantee the public unobstructed access to the replacement sidewalk as part of a comprehensive development plan that included widening Las Vegas Boulevard to accommodate a projected increase in traffic. As the court of appeals further noted, this *quid pro quo* was properly memorialized by the parties:

> Thus, there is a recorded servitude on this parcel of private property upon which the replacement sidewalk is located that the Venetian and its successors and assigns dedicate to public use to provide unobstructed pedestrian access on that sidewalk. The recorded agreement also provides in Paragraph 7 that should the sidewalk be removed, altered, or abandoned, the Venetian would dedicate the necessary right-of-way and construct a sidewalk at least equal to the State standards at the time of the restoration.

Pet.App. 8a-9a.

Petitioner's belated objection to its own negotiated agreement is both unpersuasive and inconsistent. At the district court hearing concerning the Venetian's unsuccessful motion for a preliminary injunction, the hotel's attorney acknowledged the public's right to use the sidewalk as part of the uninterrupted pedestrian path along Las Vegas Boulevard. Pet.App. 7a-8a. Moreover, he acknowledged that this right included "all incidental activity." *Id.* at 9a. In response to that concession, the Ninth Circuit made the unexceptional observation that "free speech is certainly incidental to pedestrian traffic." Pet.App. 9a, citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

Both on appeal to the Ninth Circuit and before this Court, petitioner has attempted to disavow its earlier concession by arguing that the reference in the contract to "unobstructed public access" was only meant to ensure compliance with the Americans with Disabilities Act. But, as the Ninth Circuit bluntly stated, "this corresponds neither with the statements to the district court nor with other references in the agreement." Pet.App. 8a. In any event, whatever disagreement may exist about the particular scope of this par-

ticular contract is necessarily fact-specific and does not warrant plenary review by this Court.

II. THE CASE DOES NOT CLEARLY AND DIRECTLY PRESENT THE FIFTH AND FOURTEENTH AMENDMENT CLAIMS RAISED BY PETITIONER IN ITS COMPLAINT

Petitioner's statement of the question presented focuses exclusively on the issue of state action. The Venetian accuses the Ninth Circuit of putting the cart before the horse by holding it to constitutional requirements without explicitly finding state action. Yet, petitioner has it backwards. The problem with petitioner's formulation is that it is unnecessary to reach the state action question in order to dispose of its Fifth Amendment takings and Fourteenth Amendment due process claims. No property interest has been taken or impaired in this case because petitioner consented to unobstructed pedestrian passage in order to obtain approval for its plans to construct the casino. By focusing on state action instead of the theory of its own case it is petitioner, rather than the Ninth Circuit, that has placed the cart before the horse.

In *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994), this Court stated that "[d]edication for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from proposed property use" and not a constitutional taking. More importantly, when the Venetian agreed to replace the existing sidewalk with a new sidewalk to resolve the issue of pedestrian passage along Las Vegas Boulevard, it explicitly consented to this use of the property, thus giving up the right to exclude the public. This is the touchstone of the inquiry under the Fifth Amendment Takings Clause. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Nollan v. California Coastal*

Comm., 483 U.S. 825, 831 (1987). The Venetian simply does not have the property right it now seeks to enforce. Without that right, there can be no Fifth Amendment or Fourteenth Amendment loss of property.

III. THIS CASE DOES NOT IMPERIL THE RIGHTS OF PROPERTY OWNERS AS ASSERTED BY THE PETITIONER AND PRESENTS NO SIGNIFICANT LEGAL ISSUE

Petitioner greatly exaggerates the legal significance of the issue in this case and attempts to draw the Court into an abstract dispute about the imperilment of property rights that does not exist here. It asks the Court to analyze this case divorced from the facts and from the agreements it voluntarily entered into with Clark County and the Nevada Department of Transportation. Petitioner seeks to totally distance itself from any obligation to maintain a publicly accessible sidewalk or any duty under those agreements. The Ninth Circuit correctly rejected this attempt to sidestep petitioner's own agreements.

Petitioner cannot have it both ways. Once having obtained approval to demolish the old sidewalk and build the casino it cannot walk away from its promise to provide unobstructed pedestrian passage. The agreements did not give the Venetian a new right to prevent people from walking down the street. Nor can this case mask the unmistakable public function that petitioner has undertaken. Holding petitioner to constitutional requirements under the circumstances present in this case is hardly controversial.

The Court in *Evans v. Newton*, 382 U.S. 296 (1966), was faced with a similar question of whether privately owned property could be held to constitutional standards. The property at issue was a segregated private park held in trust for the public's benefit that had assumed a municipal

function. Just as the Venetian contends here, the private trustees of the park in *Evans* argued they could circumvent the Constitution's reach because title to the park rested with them rather than with the City. Emphasizing that the mere fact of private ownership was not enough to divest the park of its "public character," the Court held that the Fourteenth Amendment applied "regardless of who now has title under state law." *Id.* at 302.[1]

The principle articulated in *Evans* was recently reaffirmed in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n,* 531 U.S. 288, 296 (2001); *id.* at 313 (Thomas, J., dissenting). There, all nine Justices of the Court reiterated that the public function of private property might subject it to constitutional requirements. The majority cited *Evans* for the proposition that a nominally private entity may be a state actor when it is intertwined with governmental functions. *Brentwood Academy*, 531 U.S. at 296. The dissenting justices' reading of *Evans*, although narrower, embraced the public function rule relevant here:

> [O]ur analysis [in *Evans*] rested on the recognition that the subject of the dispute, a park, served a "public function," much like a fire department or police department. A park, we

[1] Similarly, *Marsh v. Alabama*, 326 U.S. 501 (1946), rejected the claim that title to a sidewalk that is municipal in nature gave the private owner the absolute right to order the arrest of a Jehovah's Witness who distributed leaflets on the sidewalk in violation of the owner's posted notice prohibiting such distribution. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506.

> noted, is a "public facility" that "serves the community." Even if the city severed all ties to the park and placed its operation in private hands, the park still would be "municipal in nature," analogous to other public facilities that have given rise to a finding of state action: the streets of a company town in *Marsh v. Alabama*, 326 U.S. 501 (1946), the elective process in *Terry v. Adams*, 345 U.S. 461 (1953), and the transit system in *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451 (1952). Because the park served public functions, the private trustees operating the park were considered to be state actors.

531 U.S. at 313 (internal citations omitted).

The decision below does not break new ground, nor does it present the grave danger to private property interests that petitioner asserts. If petitioner has a quarrel, it is with the facts, not the law. As *Evans* and its progeny show, this Court has long recognized that sidewalks dedicated to public use and incorporated into the local transportation grid are "municipal in nature," 381 U.S. at 301. Contrary to the Venetian's position, the right to assemble and communicate in such spaces may not be abridged or denied regardless of the formalities of ownership. *See Hague v. CIO,* 307 U.S. 496, 515 (1939)("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.") *See also Frisby v. Schultz*, 487 U.S. 480.

The Venetian devotes the bulk of its petition to arguing that it is not a state actor in some general sense, but that mischaracterizes the issue. By agreeing to maintain a public sidewalk with unobstructed public access, petitioner has assumed both a public function and the First Amendment con-

straints that come with it. Moreover, even a private party may not invoke the coercive powers of the state to exclude a disfavored speaker from a public sidewalk -- the quintessential public forum -- because of disagreement with the message the speaker seek to deliver. *See New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

IV. THIS CASE DOES NOT INVOLVE A CONFLICT WITH OTHER COURTS

Finally, petitioner has not identified any meaningful conflict that requires this Court's intervention or resolution. In support of its asserted conflict, petitioner primarily relies on a series of state and federal decisions involving shopping malls. Pet. at 14-15. As the Ninth Circuit noted, however, those decisions are easily distinguishable from the present controversy.

> In none of the cases cited by the Venetian does the privately-owned property at issue possess all the attributes of a public forum possessed by the sidewalk in front of the Venetian. As a "thoroughfare sidewalk," seamlessly connected to public sidewalks at either end and intended for general public use, the sidewalk in front of the Venetian is "the archetype of a traditional public forum."

Pet.App. 18a, citing *Frisby,* 487 U.S. at 480.

Petitioner's reliance on an alleged conflict between the Ninth Circuit and the Nevada Supreme Court is similarly misguided. On pages 19-20 of its brief petitioner argues that the Ninth Circuit's decision directly contradicts the Nevada Supreme Court's conclusions in *S.O.C., Inc. v. Mirage Casino Hotel,* 23 P.3d 243 (Nev. 2001). A review of that case indicates otherwise. The case was decided on May

17, 2001, after the district court ruled in *Venetian*, but prior to the Ninth Circuit's ruling. *S.O.C.* was an *en banc* decision by six of the seven members of the Nevada Supreme Court. *Id.* at 244. Justice Leavitt voluntarily recused himself from the case. *Id.* at 251, n.51.

While the Court voted 5 to 1 to uphold the preliminary injunction at issue it was evenly split on the question of whether the sidewalk in question is a public forum. Three of the Justices in Justice Young's opinion stated that despite the pedestrian easement the sidewalk was not a public forum. *Id.* at 247. The concurring opinion by Justices Maupin and Shearing agreed with the results but disagreed on the issue of the public forum status of the sidewalk.

> The basic question in this matter was convincingly settled in *Venetian Casino Resort v. Local Joint Executive Board*. 45 F.Supp. 2d 1027 (D.Nev. 1999). In *Venetian*, the defendant unions obtained a permit to picket in a private pedestrian walkway fronting the Venetian Casino Resort. That sidewalk is directly across the street from, and in every relevant respect identical to, the properties at issue in the instant matter. The federal district court concluded that the Venetian property "was previously public, serves as a thoroughfare along a main public road, and serves the needs of the general public. As such, it falls within a very limited exception to the general rule that private property is not subject to the First Amendment." *Id.* at 1036. This exception must also apply here.

Id. at 252.

Justice Rose's dissenting opinion likewise treated the sidewalk as a public forum.

> The real property in question consists of two traditional sidewalks abutting Las Vegas Boulevard that are traversed daily by thousands who use the sidewalks as a principal thoroughfare along the city's most famous stretch of casinos, the Las Vegas Strip. By the very location and function of the sidewalks, I think it is impossible not to conclude that they serve as traditional public sidewalks. Similar thoroughfares, whether publicly or privately owned, have been recognized as public forums on which all First Amendment rights must be recognized and honored. Therefore, I disagree with the majority's conclusion that the area in question is not a public forum.

Id.

In light of the Nevada Supreme Court's inability to come to any majority position concerning the status of the Mirage sidewalk, petitioner's argument that there is a "concrete conflict" between the State Court and the Ninth Circuit "that can only be resolved by this Court," Pet. at 20, is incorrect.

CONCLUSION

For the reasons stated above, the writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: January 28, 2002

work" for her and they wrongly accused her of stealing customers from other salespersons. Further, Johnson alleges that Irwin allowed other employees to falsely accuse her, gave sales leads to other employees and advised them to come to work early to do stock work so they would not lose time off the sales floor. Archer and Irwin apparently also monitored Johnson to determine whether she was in fact stealing customers. In November 1997, Johnson resigned.

Johnson filed a complaint against Nordstrom, James Johansson (the store manager) and Archer under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. She alleged race discrimination in the failure to promote her, retaliation and constructive discharge. As noted, her retaliation claim consisted of, inter alia, Nordstrom's failure to promote her to the assistant manager position and Irwin's and Archer's retaliatory conduct. Johnson also alleged a state claim for intentional infliction of emotional distress. In response, Nordstrom filed a motion for summary judgment and a motion to strike certain portions of affidavits filed by Johnson. Johnson filed a motion in opposition to summary judgment and a motion to strike affidavits submitted by Nordstrom. The district court denied Johnson's motion to strike, granted in part Nordstrom's motion to strike and granted Nordstrom's motion for summary judgment on all counts. It concluded that Johnson had not demonstrated a *prima facie* case on her failure to promote claim. The court also found that Johnson did not show that Nordstrom's reasons for failing to promote her were retaliatory; she could not prove that Nordstrom's stated reasons were pretextual. As to Archer's and Irwin's retaliatory conduct, the court concluded that Johnson failed to make a *prima facie* case. It also concluded that the conduct was not extreme or

outrageous, such that would support Johnson's claim for intentional infliction of emotional distress. Johnson appeals.

II.

As everyone should know, we review a grant of summary judgment *de novo,* viewing all the facts and inferences in the light most favorable to the non-moving party. *See Pafford v. Herman,* 148 F.3d 658, 665 (7th Cir. 1998). "Summary judgment may be granted only when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Pafford,* 148 F.3d at 665.

To defeat a motion for summary judgment in a Title VII case, a plaintiff who cannot provide direct evidence of discrimination may use the "burden-shifting" method outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under this indirect method of proof, the plaintiff first may raise an inference of discrimination by offering sufficient evidence to establish a *prima facie* case. *See id.* at 802-05. If the plaintiff succeeds, the burden then shifts to the employer, who must articulate a "legitimate, nondiscriminatory reason" for the adverse action. *See Pafford,* 148 F.3d at 665 (citing *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)). "If the employer carries this burden, then the burden shifts back to the plaintiff to produce 'evidence that would, if believed by a trier of fact, show that the true reason for the employment action was discriminatory.'" *Pafford,* 148 F.3d at 665 (quoting *Sattar v.*

Motorola, Inc., 138 F.3d 1164, 1169 (7th Cir. 1998) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993))).

To establish a *prima facie* case of race discrimination in a failure to promote context, the plaintiff must show: 1) she is a member of a protected group; 2) she was qualified for the position sought; 3) she was rejected for the position; and 4) the employee promoted was not a member of the protected group and was not better qualified than the plaintiff. *See Payne v. Milwaukee Cty.*, 146 F.3d 430, 434 (7th Cir. 1998). It is undisputed that Johnson satisfies the first criterion. But the district court found that she failed to meet other elements of the *prima facie* case.

A.

The district court first concluded that Johnson had failed to make out her *prima facie* case of discrimination because she had not met her burden of showing that she was qualified for the beauty director position. The court found that the job consisted of training staff; directing the Nordstrom make-up team; overseeing promotional events and addressing staff questions and concerns. Entry on Plaintiff's Motion to Strike, Defendants' Motion to Strike, and Defendants' Motion for Summary Judgment at 36 (Sept. 26, 2000). The court concluded that Johnson was not qualified for this position because of 1) Johnson's interview answer (misstating the most important element of the position); 2) Johnson's tension with her co-workers; and 3) Johnson's failure to observe certain work policies. These factors do not appear to establish that Johnson was not qualified for the job. But we need not decide that issue; rather, we conclude that these are the

reasons proffered by Nordstrom for failing to promote Johnson, and that Johnson has failed to demonstrate that these reasons are pretextual. *See EEOC v. Our Lady of the Resurrection Med. Ctr.*, 77 F.3d 145, 150 (7th Cir. 1996) ("To expedite the process it may be preferable to get past the *prima facie* case and examine the pertinent issue of whether there was discrimination in a job action."); *see also Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1391 (7th Cir. 1990) (where the plaintiff had not met the burden of showing pretext, it was not necessary to decide whether the plaintiff established a prima facie case).

To demonstrate pretext, "a plaintiff must show more than that the employer's decision was incorrect; the plaintiff must also show the employer lied about its proffered explanation." *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 368 (7th Cir. 1998) (citing *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995)). Without direct evidence of pretext, the plaintiff must "prove pretext indirectly by showing one of the following: (1) Defendant's explanation of Plaintiff's discharge had no basis in fact, or (2) the explanation was not the 'real' reason, or (3) at least the reason stated was insufficient to warrant the [allegedly discriminatory action]." *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1133 (7th Cir. 1994) (citing *Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 (7th Cir. 1989)).

Thus, Johnson's burden was to show that Nordstrom lied when it stated that it believed Johnson was unqualified for the beauty director position, or when it stated that it believed Bennett was more qualified. Johnson's subjective belief that she was better qualified than Bennett does not, without more, demonstrate pretext. *See Johnson v. University of Wisconsin-*

than it is about the construction of specific contract language. The majority below construed that contract language as a clear expression of the parties' intent to provide the public with all of the rights on the replacement sidewalk that it had enjoyed on the previous sidewalk, including the right to free speech associated with a public forum. Pet.App. 19a. The dissent by Judge Brunetti disagreed with the majority's construction of the relevant contract language, but not with its view that the outcome of this case turns on the fact-specific meaning of particular contract provisions read in their unique context.

> I agree with the majority that, if the Venetian had truly given the public an explicit right to its property in the 1999 Agreement, then this sidewalk would indeed fall within the ambit of the First Amendment. This is in essence a matter of contract interpretation, and I believe that close scrutiny of the circumstances that led to the contract and the plain language of the contract itself, as well as the history of the piece of property at issue and its physical characteristics, will compel an entirely different conclusion than that arrived at by the majority.

Pet.App. 27a-28a.

In construing the contract language, the majority below expressly rejected petitioner's claim that it had reserved the right to exclude anyone it chose from access to the replacement sidewalk. After carefully reviewing the contested provisions, the court below concluded that petitioner had in fact contractually agreed to guarantee the public unobstructed access to the replacement sidewalk as part of a comprehensive development plan that included widening Las Vegas Boulevard to accommodate a projected increase in traffic. As the court of appeals further noted, this *quid pro quo* was properly memorialized by the parties:

> Thus, there is a recorded servitude on this parcel of private property upon which the replacement sidewalk is located that the Venetian and its successors and assigns dedicate to public use to provide unobstructed pedestrian access on that sidewalk. The recorded agreement also provides in Paragraph 7 that should the sidewalk be removed, altered, or abandoned, the Venetian would dedicate the necessary right-of-way and construct a sidewalk at least equal to the State standards at the time of the restoration.

Pet.App. 8a-9a.

Petitioner's belated objection to its own negotiated agreement is both unpersuasive and inconsistent. At the district court hearing concerning the Venetian's unsuccessful motion for a preliminary injunction, the hotel's attorney acknowledged the public's right to use the sidewalk as part of the uninterrupted pedestrian path along Las Vegas Boulevard. Pet.App. 7a-8a. Moreover, he acknowledged that this right included "all incidental activity." *Id.* at 9a. In response to that concession, the Ninth Circuit made the unexceptional observation that "free speech is certainly incidental to pedestrian traffic." Pet.App. 9a, citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

Both on appeal to the Ninth Circuit and before this Court, petitioner has attempted to disavow its earlier concession by arguing that the reference in the contract to "unobstructed public access" was only meant to ensure compliance with the Americans with Disabilities Act. But, as the Ninth Circuit bluntly stated, "this corresponds neither with the statements to the district court nor with other references in the agreement." Pet.App. 8a. In any event, whatever disagreement may exist about the particular scope of this par-

ticular contract is necessarily fact-specific and does not warrant plenary review by this Court.

II. THE CASE DOES NOT CLEARLY AND DIRECTLY PRESENT THE FIFTH AND FOURTEENTH AMENDMENT CLAIMS RAISED BY PETITIONER IN ITS COMPLAINT

Petitioner's statement of the question presented focuses exclusively on the issue of state action. The Venetian accuses the Ninth Circuit of putting the cart before the horse by holding it to constitutional requirements without explicitly finding state action. Yet, petitioner has it backwards. The problem with petitioner's formulation is that it is unnecessary to reach the state action question in order to dispose of its Fifth Amendment takings and Fourteenth Amendment due process claims. No property interest has been taken or impaired in this case because petitioner consented to unobstructed pedestrian passage in order to obtain approval for its plans to construct the casino. By focusing on state action instead of the theory of its own case it is petitioner, rather than the Ninth Circuit, that has placed the cart before the horse.

In *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994), this Court stated that "[d]edication for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from proposed property use" and not a constitutional taking. More importantly, when the Venetian agreed to replace the existing sidewalk with a new sidewalk to resolve the issue of pedestrian passage along Las Vegas Boulevard, it explicitly consented to this use of the property, thus giving up the right to exclude the public. This is the touchstone of the inquiry under the Fifth Amendment Takings Clause. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Nollan v. California Coastal*

Comm., 483 U.S. 825, 831 (1987). The Venetian simply does not have the property right it now seeks to enforce. Without that right, there can be no Fifth Amendment or Fourteenth Amendment loss of property.

III. THIS CASE DOES NOT IMPERIL THE RIGHTS OF PROPERTY OWNERS AS ASSERTED BY THE PETITIONER AND PRESENTS NO SIGNIFICANT LEGAL ISSUE

Petitioner greatly exaggerates the legal significance of the issue in this case and attempts to draw the Court into an abstract dispute about the imperilment of property rights that does not exist here. It asks the Court to analyze this case divorced from the facts and from the agreements it voluntarily entered into with Clark County and the Nevada Department of Transportation. Petitioner seeks to totally distance itself from any obligation to maintain a publicly accessible sidewalk or any duty under those agreements. The Ninth Circuit correctly rejected this attempt to sidestep petitioner's own agreements.

Petitioner cannot have it both ways. Once having obtained approval to demolish the old sidewalk and build the casino it cannot walk away from its promise to provide unobstructed pedestrian passage. The agreements did not give the Venetian a new right to prevent people from walking down the street. Nor can this case mask the unmistakable public function that petitioner has undertaken. Holding petitioner to constitutional requirements under the circumstances present in this case is hardly controversial.

The Court in *Evans v. Newton*, 382 U.S. 296 (1966), was faced with a similar question of whether privately owned property could be held to constitutional standards. The property at issue was a segregated private park held in trust for the public's benefit that had assumed a municipal

function. Just as the Venetian contends here, the private trustees of the park in *Evans* argued they could circumvent the Constitution's reach because title to the park rested with them rather than with the City. Emphasizing that the mere fact of private ownership was not enough to divest the park of its "public character," the Court held that the Fourteenth Amendment applied "regardless of who now has title under state law." *Id.* at 302.[1]

The principle articulated in *Evans* was recently reaffirmed in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n,* 531 U.S. 288, 296 (2001); *id.* at 313 (Thomas, J., dissenting). There, all nine Justices of the Court reiterated that the public function of private property might subject it to constitutional requirements. The majority cited *Evans* for the proposition that a nominally private entity may be a state actor when it is intertwined with governmental functions. *Brentwood Academy*, 531 U.S. at 296. The dissenting justices' reading of *Evans*, although narrower, embraced the public function rule relevant here:

> [O]ur analysis [in *Evans*] rested on the recognition that the subject of the dispute, a park, served a "public function," much like a fire department or police department. A park, we

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[1] Similarly, *Marsh v. Alabama*, 326 U.S. 501 (1946), rejected the claim that title to a sidewalk that is municipal in nature gave the private owner the absolute right to order the arrest of a Jehovah's Witness who distributed leaflets on the sidewalk in violation of the owner's posted notice prohibiting such distribution. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506.

> noted, is a "public facility" that "serves the community." Even if the city severed all ties to the park and placed its operation in private hands, the park still would be "municipal in nature," analogous to other public facilities that have given rise to a finding of state action: the streets of a company town in *Marsh v. Alabama*, 326 U.S. 501 (1946), the elective process in *Terry v. Adams*, 345 U.S. 461 (1953), and the transit system in *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451 (1952). Because the park served public functions, the private trustees operating the park were considered to be state actors.

531 U.S. at 313 (internal citations omitted).

The decision below does not break new ground, nor does it present the grave danger to private property interests that petitioner asserts. If petitioner has a quarrel, it is with the facts, not the law. As *Evans* and its progeny show, this Court has long recognized that sidewalks dedicated to public use and incorporated into the local transportation grid are "municipal in nature," 381 U.S. at 301. Contrary to the Venetian's position, the right to assemble and communicate in such spaces may not be abridged or denied regardless of the formalities of ownership. *See Hague v. CIO,* 307 U.S. 496, 515 (1939)("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.") *See also Frisby v. Schultz*, 487 U.S. 480.

The Venetian devotes the bulk of its petition to arguing that it is not a state actor in some general sense, but that mischaracterizes the issue. By agreeing to maintain a public sidewalk with unobstructed public access, petitioner has assumed both a public function and the First Amendment con-

straints that come with it. Moreover, even a private party may not invoke the coercive powers of the state to exclude a disfavored speaker from a public sidewalk -- the quintessential public forum -- because of disagreement with the message the speaker seek to deliver. *See New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

IV. THIS CASE DOES NOT INVOLVE A CONFLICT WITH OTHER COURTS

Finally, petitioner has not identified any meaningful conflict that requires this Court's intervention or resolution. In support of its asserted conflict, petitioner primarily relies on a series of state and federal decisions involving shopping malls. Pet. at 14-15. As the Ninth Circuit noted, however, those decisions are easily distinguishable from the present controversy.

> In none of the cases cited by the Venetian does the privately-owned property at issue possess all the attributes of a public forum possessed by the sidewalk in front of the Venetian. As a "thoroughfare sidewalk," seamlessly connected to public sidewalks at either end and intended for general public use, the sidewalk in front of the Venetian is "the archetype of a traditional public forum."

Pet.App. 18a, citing *Frisby,* 487 U.S. at 480.

Petitioner's reliance on an alleged conflict between the Ninth Circuit and the Nevada Supreme Court is similarly misguided. On pages 19-20 of its brief petitioner argues that the Ninth Circuit's decision directly contradicts the Nevada Supreme Court's conclusions in *S.O.C., Inc. v. Mirage Casino Hotel,* 23 P.3d 243 (Nev. 2001). A review of that case indicates otherwise. The case was decided on May

17, 2001, after the district court ruled in *Venetian*, but prior to the Ninth Circuit's ruling. *S.O.C.* was an *en banc* decision by six of the seven members of the Nevada Supreme Court. *Id.* at 244. Justice Leavitt voluntarily recused himself from the case. *Id.* at 251, n.51.

While the Court voted 5 to 1 to uphold the preliminary injunction at issue it was evenly split on the question of whether the sidewalk in question is a public forum. Three of the Justices in Justice Young's opinion stated that despite the pedestrian easement the sidewalk was not a public forum. *Id.* at 247. The concurring opinion by Justices Maupin and Shearing agreed with the results but disagreed on the issue of the public forum status of the sidewalk.

> The basic question in this matter was convincingly settled in *Venetian Casino Resort v. Local Joint Executive Board*. 45 F.Supp. 2d 1027 (D.Nev. 1999). In *Venetian,* the defendant unions obtained a permit to picket in a private pedestrian walkway fronting the Venetian Casino Resort. That sidewalk is directly across the street from, and in every relevant respect identical to, the properties at issue in the instant matter. The federal district court concluded that the Venetian property "was previously public, serves as a thoroughfare along a main public road, and serves the needs of the general public. As such, it falls within a very limited exception to the general rule that private property is not subject to the First Amendment." *Id.* at 1036. This exception must also apply here.

Id. at 252.

Justice Rose's dissenting opinion likewise treated the sidewalk as a public forum.

> The real property in question consists of two traditional sidewalks abutting Las Vegas Boulevard that are traversed daily by thousands who use the sidewalks as a principal thoroughfare along the city's most famous stretch of casinos, the Las Vegas Strip. By the very location and function of the sidewalks, I think it is impossible not to conclude that they serve as traditional public sidewalks. Similar thoroughfares, whether publicly or privately owned, have been recognized as public forums on which all First Amendment rights must be recognized and honored. Therefore, I disagree with the majority's conclusion that the area in question is not a public forum.

Id.

In light of the Nevada Supreme Court's inability to come to any majority position concerning the status of the Mirage sidewalk, petitioner's argument that there is a "concrete conflict" between the State Court and the Ninth Circuit "that can only be resolved by this Court," Pet. at 20, is incorrect.

CONCLUSION

For the reasons stated above, the writ of *certiorari* should be denied.

Respectfully submitted,

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